



RE: RAMP attached for UPRR review and comment & related matters....

Fransen, Curt - Reg1

to:

Lawrence, Robert, bcleary

08/04/2006 12:06 PM

Cc:

Ed Moreen, Clifford Villa, hfunke, Phil Cernera, Dianne Herz, RCBYLSMA, GLHONEYM

Hide Details

From: "Fransen, Curt - Reg1" <FransenC@idhw.state.id.us> Sort List...

To: "Lawrence, Robert" <Robert.Lawrence@dgsllaw.com>, bcleary@indian-law.org,

Cc: Ed Moreen/R10/USEPA/US@EPA, Clifford Villa/R10/USEPA/US@EPA,

hfunke@indian-law.org, Phil Cernera <philc@cdatribe-nsn.gov>, Dianne Herz

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Bob, with respect to the language of the actual transfer (the deeds); my concern is how UP will describe the property interest being transferred. Idaho law does not require metes and bounds or other precise legal descriptions; however, the description of the property must be sufficient to locate the property without resort to extrinsic evidence. UP owns property within Shoshone, and maybe Kootenai and Benewah Counties, which was not addressed by the CD, is not part of the ROW and will not be transferred to the State/Tribe. For example, UP apparently owns property up Nine Mile which adjoins the ROW—where the RV Park owned/leased by Don Greible is located. The question is how will UP differentiate between those sorts of properties and the ROW to be transferred? This is one example of why we would like to see the proposed deeds as soon as possible. I anticipate that a number of issues may exist that we will have to work through. I could be wrong—but without the proposed deeds we are dealing with a large unknown.

Furthermore the unilaterally announced 30 day review schedule at the end of your July 6 letter is a non-starter. In the first place, if Labor Day, September 4 is your target, please note that today is August 4 and we have not received any draft deeds or property descriptions. Accordingly, your announced 30 day review period and target date are incompatible. Second, the 30 review period is your schedule, not ours. 30 days may be adequate, but until we see the drafts and have a chance to assess the sorts of issues that may exist—we do not know and cannot predict or commit to such schedule. Third and fundamentally, UP's intention to finalize, sign and record deeds after the 30 period—without agreement by the State/Tribe—is contrary to basic property law and, specifically, Idaho law. The deeds must be "delivered" which also requires acceptance by the grantees; real property cannot be transferred (nor deeds recorded) without the agreement of the grantee.

I have been reluctant to respond, in detail, to your July 6 letter. We are moving the process along as quickly as possible and real progress is being made. To the extent your letter is an attempt to keep this process moving and on track—it has value and is not worth quarreling over. However to the extent it attempts to establish unilateral deadlines, interpret the past understandings and statements of the parties or will be cited and relied on by UP as somehow establishing facts or resolving ongoing issues—I reluctantly conclude it may be necessary to respond. As you know, I have objected to this sort of exchange in the past on the basis that time spent positioning these issues detracts from efforts and time available to resolve them. That said, and for the purpose of indicating that Idaho is not in agreement with the statements, positions and conclusions of your July 6 letter, the following extremely brief response is provided (referencing the Roman numeral sections of your letter):

- I. Idaho agrees UP has made efforts to resolve encroachments. The parties, together, have worked through and resolved a great number of these issues. Idaho has agreed to allow a great number of encroachments to remain unresolved (such as fences, agricultural and other widespread encroachments) through a variety of mechanisms (such as simply allowing such encroachments to continue based on notifications and the like). Many other encroachments have been resolved by UP or allowed to continue by agreement of UP and Parks on a case-by-case basis. Nevertheless, a handful of significant encroachments remain unresolved. As to these, Idaho cannot agree that UP's efforts rise to the level of effort required. UP has been willing to send letters, provide leases and take other non-confrontational paper related efforts. Where those efforts have not been successful, UP has apparently been unwilling to use other available means such as enforcement of its property rights, buyouts and the like. Idaho contends that taking such efforts as to some encroachments is well within the "good faith" requirement. Simply announcing that the resolution of these few remaining encroachments will fall to the state is certainly not good faith.
- II. Whether the remaining encroachments encroach upon or affect the trail is irrelevant. UP have CD

obligations as to the entire ROW. The obligation to resolve encroachments was not restricted to the trail portion of the right of way. Idaho will be responsible for the entire ROW within its ownership area. The obligations created by the Trails Act are not restricted to some 10-12 foot strip of trail.

- III. Parks remains committed to working through these remaining encroachments with UP, however, does not agree to the characterization of the facts, efforts or conclusions that UP draws as to each of those listed. These issues will be addressed on a case-by-case in discussions with UP. Unilateral dismissal of these encroachments on the basis that they do not affect the trail or that past efforts to resolve them have been unsuccessful and the like—is inappropriate.
- IV. See previous comments above regarding the announced 30 day schedule and delivery of deeds. A transfer cannot be effected without the agreement of the grantee.

I look forward to moving forward with you to resolve these matters. The contents and tone of this letter are not intended in any way to suggest that the parties have not enjoyed a very good working relationship throughout this long process. We have resolved innumerable issues over the past 10 years; I am confident we can resolve the few that remain in the same manner. CAF

-----Original Message-----

From: Lawrence, Robert [<mailto:Robert.Lawrence@dgslaw.com>]

Sent: Friday, August 04, 2006 8:24 AM

To: bcleary@indian-law.org

Cc: Fransen, Curt - Reg1; Moreen.Ed@epamail.epa.gov; villa.clifford@epamail.epa.gov; hfunke@indian-law.org; Phil Cerner; Dianne Herz; RCBYLSMA@up.com; GLHONEYM@up.com; Lawrence, Robert

Subject: RE: RAMP attached for UPRR review and comment & related matters....

Brian,

Thank you for providing us with the draft of the RAMP. We will provide you with our comments on the RAMP as requested.

As you and I have discussed, UP and the Tribe will just have to agree to disagree on the target date for transfer of the ROW. UP's understanding always was that the target date for transfer was Labor Day, September 4, 2006. We confirmed that in our prior conversations and e-mail correspondence. I have attached one such e-mail exchange between Howard and me below, immediately following this e-mail. I understand that you disagree with this understanding, but it remains critical to the Railroad that the ROW transfer occur as expeditiously as possible.

With respect to items 1 and 3 of your e-mail, UP has gone above and beyond the requirements of the CD and the CITU agreement and has transferred to the Governments pertinent information and documents that we have. We want to facilitate the transfer, however, and are checking to determine whether we can locate additional pertinent information. With respect to item 2 (concerning the language by which UP's legal interests will be transferred to the governments), we intend to transfer whatever right, title or interest UP has in the ROW to the Governments by quitclaim deed in accordance with the requirements of the Consent Decree and the CITU Agreement, as described in our July 6, 2006 letter to Curt and Howard. If you have any suggested language, please let us know as soon as possible. We are glad to discuss items 1-3 further with you. How does your schedule look for next week (other than Tuesday and Wednesday)?

We appreciate your attention to this matter and look forward to its rapid resolution.

Bob.

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e-mail from Howard Funke to R. Lawrence, C. Franzen and B. Cleary, copied to G. Honeyman, M. Cooper and R. Bylsma, dated March 27, 2006

I believe a more appropriate characterization would be "agreed to target dates" rather than "deadlines". Be that as it may, I believe our objectives can be accomplished within the timeframes you described. Both the Tribe and the State are working diligently and in good faith, focused on our objective.

Do you have the legislative and other historic record for the 1888 Congressional grant for the right-of-way across the Reservation?

Howard

From: Lawrence, Robert [<mailto:Robert.Lawrence@dgslaw.com>]
Sent: Monday, March 27, 2006 6:28 PM
To: Curt Fransen (E-mail); bcleary@indian-law.org; hfunke@indian-law.org
Cc: Lawrence, Robert; GLHONEYM@up.com; RCBYLSMA@up.com; Cooper, Mike -- MFG
Subject: Coeur d'Alene - TLOP and Transfer of ROW
Importance: High

Brian, Howard and Curt,

This e-mail follows up our meeting in Howard's office on February 21, 2006 to discuss finalizing the TLOP, the State/Tribe Agreement and any other documents necessary for UP to transfer its right-of-way to the State and the Tribe. The State and Tribe agreed that April 21, 2006 (60 days from the date of our meeting) was a reasonable deadline for completing the draft final TLOP. I spoke with Brian Cleary earlier this afternoon and understand that the State and Tribe have made substantial progress on the TLOP. However, I understand that Curt Fransen will be out of the office and unavailable for most of April. Thus, Brian does not expect that the State and Tribe will be able to meet the April 21 date for completing the TLOP. Brian now expects to finalize the TLOP on or before May 15, 2006.

UP is pleased that the State and Tribe have made progress on the TLOP, but is disappointed that the April 21 deadline for finalizing the TLOP apparently will slip. UP's main interest is that *all* underlying documents be finalized so that UP can transfer the ROW to the Tribe and State on or before Labor Day, September 4, 2006. At our meeting on February 21, UP, the State and the Tribe agreed that Labor Day 2006 was an appropriate, reasonable deadline for finalizing the underlying documents and transferring the ROW from UP to the State and the Tribe. Brian has informed me that he does not expect that this delay in finalizing the TLOP to impact the parties' September 4, 2006 date for completing transfer of the ROW. UP encourages the State and the Tribe to complete the TLOP as quickly as possible so that we all can meet our mutual objective of transferring the right of way on or before Labor Day.

If we can be of any assistance in expediting the process, please let me know.

Bob

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From: Brian Cleary [<mailto:bcleary@indian-law.org>]
Sent: Tuesday, July 25, 2006 10:50 PM
To: Lawrence, Robert
Cc: 'Fransen, Curt - Reg1'; Moreen.Ed@epamail.epa.gov; villa.clifford@epamail.epa.gov; hfunke@indian-law.org; 'Phil Cernera'; 'Dianne Herz'
Subject: RAMP attached for UPRR review and comment & related matters....

*PRIVILEGED AND CONFIDENTIAL
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Dear Bob:

On behalf of the State and Tribe, I transmit the attached copy of the Governments' negotiated draft Response Action Maintenance Plan (RAMP) (previously known as the TLOP) for UPRR consideration and comment. The attached RAMP does not include budget estimates (Appendix D), as the Governments are presently updating the budget schedules to be consistent with the changes we've negotiated to the RAMP during the past several months. We anticipate sending those revised budgets to you by the end of this week.

The attached document has not been reviewed and approved by the Tribal Council. We worked closely with Tribal staff to develop the enclosed RAMP and I believe the Council will accept their recommendation to approve its present form. Nevertheless, Council approval will be needed and I intend to present the matter to them within the next two weeks. At

this point, however, the Governments believe the attached document is developed sufficiently for UPRR to review and comment on it.

Please transmit any UPRR comments on the RAMP to the below-listed representatives of the Governments by August 8th. Following consideration of UPRR's comments, the Governments will provide a short additional opportunity for public review and comment on the proposed RAMP, which we anticipate beginning on August 15th and ending on August 29th.

As I mentioned during our telephone call last week, as the RAMP review and comment period proceeds, the Governments will continue negotiating the remaining State-Tribe agreements with respect to general trail operations and Heyburn Park. As the Governments' expressed to UPRR at our meeting on February 22nd, we are committed to good-faith negotiation of these agreements with a "target" date of Labor Day in mind. Since that meeting, the Governments have diligently proceeded to negotiate the RAMP with that "target" date in mind. The Tribe is hopeful that our RAMP labors will serve the Governments' in preparing the remaining agreements. However, the reality of intervening summer vacations may impact this goal, as well as unforeseen issues that may arise during negotiation of the remaining agreements. We are, however, desirous and committed to completing the remaining agreements as soon as possible.

As I also noted during our call last week, the Governments will not likely be prepared to take title to the right-of-way from UPRR by a "target" date of Labor Day. In fact, I do not recall the Tribe agreeing to a Labor Day "target" for title transfer at our February meeting. I recall only that we agreed to a Labor-Day "target" date on the state-tribe agreements. I do not raise this point for the purpose of frustrating title transfer, but merely to highlight the need for the parties to clarify both the nature and form of such title transfer to fully protect our client's respective interests in the event of future litigation by adjoining landowners. In this regard, discussions with UPRR would be helpful for the following purposes:

- (1) to discuss production of all UPRR documents related to the 1888 legislation providing for the grant of the railroad right-of-way through the Coeur d'Alene Indian Reservation for the purpose of ascertaining the nature and scope of the legal interests that will be transferred from UPRR to the Governments;
- (2) to refine the language, in light of the forgoing information, in the documents by which UPRR's legal interests in the right-of-way will be transferred from UPRR to the Governments;

- (3) to confirm the extent of agreements between UPRR and property owners adjoining the right-of-way - which is distinct from the “encroachment” issue discussed below – and that the Governments indeed have the complete record of such agreements to date. My recent experience in the matter of *Wood v. Fenter*, leads me to question whether the Tribe may be missing some UPRR documentation of such agreements. The Governments want to ensure they understand and document any such existing UPRR agreements to ensure smooth transfer and administration of them in the future;

Your letter of July 10th refers to ongoing discussions between the State and UPRR to clarify “encroachment” questions on that portion of the right-of-way” where the State will assume lead management responsibility. I believe that is distinct from the above note agreements described in item #3 above. I am checking with the Tribe to confirm whether we have any like “encroachment” issues on that portion of the right-of-way administered by the Tribe within the Reservation and will let you know shortly if a like situation exists. If so, I am committed to working with you to resolve any such matter in a timely fashion.

The Governments look forward to receiving UPRR’s comments on the enclosed draft RAMP. As the Governments proceed with negotiating the remaining agreements, we share the company’s desire to complete them as soon as possible. We keep you posted on our progress in this regard.

In the meantime, the Governments would like to discuss and clarify the above noted questions and concerns regarding the historic documents, refining the language of conveyance, and outstanding agreements with landowners adjoining the right-of-way. Please contact me at your earliest convenience to discuss a path for making progress on these remaining matters.

Very truly yours,

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